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SUSAN LAPSLEY
Director



2007 DEC -5 AM 10:37
OFFICE OF ADMINISTRATIVE LAW
SUSAN LAPSLEY

Date: December 5, 2007

To: Frederick L. Baker

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 24(S)**
(CTU 2007-1203-01)
(Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(C))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 2042

On December 3, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, section 2042, adopted by the Board of Parole Hearings, is an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600¹, which should have been, but was not, adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

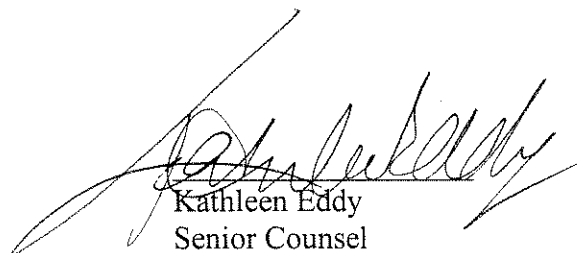
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added)

¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Pursuant to Government Code section 11343.6, the filing of a rule with the Secretary of State raises the rebuttable presumption that it was duly adopted and that all the requirements of the APA have been met. You have challenged as an underground regulation California Code of Regulations, title 15, section 2042. Section 2042 was originally filed with the Secretary of State on June 11, 1979. It has been amended twice since the original adoption; the most recent amendment was filed with the Secretary of State on October 14, 2003.

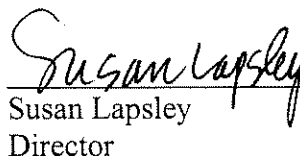
Section 2042, then, has been adopted as a regulation and filed with the Secretary of State pursuant to the APA.² There is no evidence to rebut the statutory presumption established pursuant to Government Code section 11343.6. The challenged rule is not, therefore, an underground regulation.³

Date: December 5, 2007



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² The correct avenue for requesting an adoption, amendment or repeal of a properly adopted regulation is to submit a petition pursuant to Government Code section 11340.6, to the agency that adopted the regulation requesting such a change.

³ A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*

(D) The challenged rule has expired by its own terms.